

ARKANSAS COURT OF APPEALSDIVISION I
No. CA08-552

MISTY MARTIN

APPELLANT

V.

ARKANSAS DEP'T. OF HUMAN
SERVICES and J.M., E.R., and B.H.,
MINOR CHILDREN

APPELLEES

Opinion Delivered September 17, 2008APPEAL FROM THE GARLAND
COUNTY CIRCUIT COURT,
[NO. JV2006-837A,B&C and JV2007-
483]HONORABLE VICKI SHAW COOK,
JUDGE

AFFIRMED

KAREN R. BAKER, Judge

Misty Martin appeals from an order terminating her parental rights to J.M., born October 22, 1999; E.R., born January 10, 2006; and B.H., born January 15, 2004, challenging the sufficiency of the evidence. We affirm.

On December 22, 2006, DHS filed a petition for emergency custody of the children after B.H., who is deaf and has cerebral palsy, was discovered wandering alone in the street while Ms. Martin was asleep. She tested positive for amphetamines that day and admitted that she had taken J.M.'s medication for attention deficit disorder. The circuit court entered an order for emergency custody and, after a hearing on December 29, 2006, entered an order of probable cause. An adjudication hearing was held on January 26, 2007. In the resulting order, the court found the children to be dependent-neglected; stated that the goal of the case would be reunification; and approved the case plan submitted by DHS. Problems noted in this

case plan were Ms. Martin's neglect and inadequate supervision of the children, her failure to protect them, and J.M.'s sexual abuse.¹ Ms. Martin was given supervised visitation and was directed to submit to counseling. In a mediation agreement incorporated into this order, she agreed to undergo a psychiatric evaluation; to follow all resulting recommendations; to participate in parenting classes; and to submit to random drug tests.

On April 17, 2007, the court granted a motion for a twenty-nine-day trial placement of J.M. with Ms. Martin, subject to several conditions that included the following: "Any child care utilized by Mrs. Martin shall first be approved by DHHS, and shall be bound likewise by compliance with the safety or ASAP plan, and at no time shall the child remain alone in the home." J.M. was returned to foster care on May 23, 2007, after he was physically abused by a neighbor Ms. Martin had asked to babysit. He was placed in Rivendell after making threats in his foster home and was later admitted to a residential program. His diagnoses were oppositional defiant disorder, attention deficit disorder with hyperactivity, and mood disorder.

In a review hearing held on July 20, 2007, the psychological examiners's report was introduced into evidence. He diagnosed Ms. Martin as having an adjustment disorder and a personality disorder with narcissistic and borderline symptoms. The examiner found that she has very little empathy for her children and questioned her insight into their problems. He recommended that these issues be thoroughly addressed in therapy before reunification could be considered. DHS's court report stated that Ms. Martin had not utilized the reunification

¹The oldest child, J.R., born August 25, 1990, was noted as a runaway and is not part of this appeal.

services offered to her. The court found that Ms. Martin had partially complied with the case plan and court orders and continued the case's concurrent goals of reunification and dual-tracking.

A permanency-planning hearing was held on October 31, 2007. DHS recommended a permanency plan of termination as a result of Ms. Martin's failure to utilize reunification services. In the resulting order, the court changed the case's goal to termination, finding that Ms. Martin had only partially complied with the case plan and the court's orders.

On November 27, 2007, DHS filed a petition for termination of Ms. Martin's parental rights. At the termination hearing held on February 6, 2008, testimony was given by Ms. Martin; B.H.'s teacher, Citronella Dixon; B.H.'s and E.R.'s foster mother, Donna Morales; J.M.'s therapist, James Harris; the family-service worker, Crystalle Jones; and an adoption specialist, Melinda Schales. The report of Ms. Martin's social worker, who provided in-home counseling services to her, was admitted into evidence.

On February 7, 2007, the circuit court entered an order terminating Ms. Martin's parental rights. The court found that it would be contrary to the children's best interests to return them to her care; that continuing contact with her would be harmful to their health and safety; that return to the parental home could not be accomplished within a reasonable period of time viewed from the children's perspectives; that the children had been in DHS's custody for over twelve months; that they were adoptable; and that they needed a consistent and stable home. The court stated that Ms. Martin did not have such stability at that time and that she could not meet the children's special needs, noting that she was unable to

communicate with B.H. by sign language. The court found that Ms. Martin had failed to prove that she had stable housing, even though DHS had assisted her with two housing applications, which she failed to complete. The court also stated that Ms. Martin had refused services through Potter's Clay, that she had not proven that she had sought assistance with her electric bills, or that she had regularly attended counseling. The court found that Ms. Martin had lived in two motels and with a friend at a residence lacking electricity. The court stated that, despite a meaningful effort by DHS to rehabilitate the home and correct the conditions that caused removal, those conditions had not been remedied by Ms. Martin. The court also found that, subsequent to the filing of the original emergency petition, other factors or issues arose that demonstrated that return of the children to the parental home would be contrary to their health, safety and welfare, and that, despite the offer of appropriate family services, Ms. Martin had manifested the incapacity or indifference to remedy the subsequent issues or factors. Ms. Martin then filed her notice of appeal. Ms. Martin argues on appeal that the trial court erred in finding that termination of her parental rights was in the best interests of her children and that grounds for termination existed.

Termination of parental rights is an extreme remedy in derogation of the natural rights of the parents. Nevertheless, parental rights will not be enforced to the detriment or destruction of the health and well-being of the child. *Wright v. Ark. Dep't of Human Servs.*, 83 Ark. App. 1, 115 S.W.3d 332 (2003). Pursuant to Ark. Code Ann. § 9-27-341(b)(3) (Repl. 2008), the facts warranting termination of parental rights must be proven by clear and convincing evidence. In reviewing the trial court's evaluation of the evidence, this court will

not reverse unless the trial court clearly erred in finding that the relevant facts were established by clear and convincing evidence. *Id.* Clear and convincing evidence is the degree of proof that will produce in the fact-finder a firm conviction regarding the allegation sought to be established. *Id.* Furthermore, this court will defer to the trial court's evaluation of the credibility of the witnesses. *Id.*

Arkansas Code Annotated section 9-27-341(b) provides in relevant part:

(3) An order forever terminating parental rights shall be based upon a finding by clear and convincing evidence:

(A) That it is in the best interest of the juvenile, including consideration of the following factors:

(i) The likelihood that the juvenile will be adopted if the termination petition is granted; and

(ii) The potential harm, specifically addressing the effect on the health and safety of the child, caused by returning the child to the custody of the parent, parents, or putative parent or parents; and

(B) Of one (1) or more of the following grounds:

(i)(a) That a juvenile has been adjudicated by the court to be dependent-neglected and has continued out of the custody of the parent for twelve (12) months and, despite a meaningful effort by the department to rehabilitate the parent and correct the conditions that caused removal, those conditions have not been remedied by the parent.

. . . .

(vii)(a) That other factors or issues arose subsequent to the filing of the original petition for dependency-neglect that demonstrate that return of the juvenile to the custody of the parent is contrary to the juvenile's health, safety, or welfare and that, despite the offer of appropriate family services, the parent has manifested the incapacity or indifference to remedy the subsequent issues or factors or rehabilitate the parent's circumstances that prevent return of the juvenile to the custody of the parent.

In determining whether there is clear and convincing evidence that termination is in the children's best interests, the court is to consider, among other factors, whether they are likely to be adopted if the termination petition is granted. *See* Ark. Code Ann. § 9-27-341(b)(3)(A)(i) (Repl. 2008). Every factor, however, need not be established by clear and convincing evidence. *Davis v. Ark. Dep't of Health & Human Servs.*, 98 Ark. App. 275, 254 S.W.3d 762 (2007).

Ms. Martin argues that the children's special needs could make the process of adoption difficult. She points out that B.H. has cerebral palsy and is deaf and that J.M. has behavioral problems that include sexual acting out. Ms. Martin also disputes that returning the children to her was potentially harmful to their safety and health because there has been no evidence of her abusing alcohol or drugs since the incident that prompted DHS to take emergency custody of the children. She stresses that she has remained employed since October 2006; that she had a home at the time of the termination hearing; and that she regularly attended counseling for ten months, "albeit with a lapse between June and September of 2007 . . . [when] she lost her way and gave up for awhile." Ms. Martin admits that she moved frequently but contends that it was premature to consider her ability to provide stability for J.M. because he was in residential therapeutic treatment and would be placed in a therapeutic foster home after his release.

We hold that the trial court's findings on the children's best interests were supported by the evidence. Melinda Schales, the adoption specialist, testified that the children were adoptable. E.R. has no physical or mental problems, and at the time of trial, was learning sign

language so she could communicate with B.H., with whom she is close. B.H. was learning to communicate by sign language and was approved for a cochlear implant. His special-education teacher testified that he was receiving speech, occupational, and physical therapy and that he should attend the Arkansas School for the Deaf as soon as it would accept him. His foster mother testified that B.H. could walk and run with braces. She said that he was acting out because he did not know how to effectively communicate his needs and that the family was helping to redirect his behavior. She described the close bond between E.R. and B.H. and testified that it was very important that they be placed together.

J.M.'s therapist, James Harris, testified that, at first, J.M.'s moods were unstable and he acted out sexually but his behavior had improved over the past couple of months. He said that when J.M. was released from in-house therapeutic care, he would need to be placed in a therapeutic foster home. He testified that J.M. was very needy and that the most important thing he needed was a schedule and "knowing what's going to happen." He recognized the difficulty caused by J.M.'s sexualized behavior early in treatment. Nevertheless, he testified that J.M. was adoptable, with an appropriate safety plan. Because of this issue, he did not recommend that J.M. be adopted with his siblings or in a home with younger children, but said that this was not a "deal-breaker." He emphasized that J.M. was not a perpetrator, but rather, "sexually reactive." He did not have an opinion on whether Ms. Martin's parental rights should be terminated, but said that he did recommend that J.M. be in a very structured environment where all of his basic needs would be met on a regular basis.

In our view, the very problems presented by J.M. were evidence that returning the

children to Ms. Martin would be contrary to their health and safety. The physical abuse that he suffered at the hands of a neighbor with whom Ms. Martin left him during the trial placement perfectly illustrated the potential danger the children were in while in her custody.

Challenging the grounds for termination, appellant first argues that DHS failed to prove that she did not remedy the condition that caused removal – inadequate supervision – because it had not allowed her to supervise her children without its involvement. She cites no legal authority to support this argument, and we cannot agree that her progress could be evaluated only by experimentally placing the children back in her care and waiting until more harm occurred to them before terminating her parental rights.

Ms. Martin also contends that the conditions that caused removal had been remedied and that there was insufficient evidence to support the other ground for termination – that, subsequent to the original petition, other factors or issues arose that demonstrated that return of the children to her was contrary to their health, safety or welfare, and that, despite the offer of services, she manifested incapacity or indifference to remedy the subsequent factors or issues. We disagree.

We believe that DHS established grounds for termination. There is no question that appellant did achieve partial compliance by remaining employed, completing parenting classes, submitting to the psychiatric evaluation, and complying with her therapist's recommendations. Nevertheless, a parent's rights may be terminated even though she is in partial compliance with the case plan. *Chase v. Ark. Dep't of Human Servs.*, 86 Ark. App. 237, 184 S.W.3d 453 (2004). Even full completion of a case plan is not determinative of defeating

a petition to terminate parental rights. *Wright v. Ark. Dep't of Human Servs.*, *supra*. What matters is whether completion of the case plan achieved the intended result of making the parent capable of caring for the child. *Id.*

Ms. Jones testified that Ms. Martin failed to properly supervise her children and made poor choices. She stated that appellant did not utilize what she had been taught in the parenting classes, which was made evident by her leaving J.M. with the neighbor who injured him. Ms. Jones said that appellant did not inform her of his injuries; instead, she learned of his bruises and shaved head from B.H.'s therapist. When this case was opened, she said, appellant and her children were living with five other adults, none of whom worked; one of them had pending charges for conspiracy to commit murder. Ms. Jones also stated and Ms. Martin admitted that during this proceeding, she had moved four times, living at two motels and a friend's house that did not have utilities. She also admitted not informing Ms. Jones of J.M.'s injuries and not attending counseling for about three months during the previous summer.

Ms. Martin concludes her brief by arguing that the cause of her problems is poverty and asks this court to reverse and remand for more reunification services. We cannot agree that poverty caused Ms. Martin to fall asleep and fail to notice that her two-year old child had wandered into the street, to take J.M.'s medication, to leave him with a neighbor who physically abused him, or to refuse many of the reunification services offered to her. *See Browning v. Ark. Dep't of Human Servs.*, 85 Ark. App. 495, 157 S.W.3d 540 (2004). A stable home is one of a child's most basic needs. *Latham v. Ark. Dep't of Health & Human Servs.*, 99 Ark. App. 25, 256 S.W.3d 543 (2007), and on this evidence it was not error for the trial court

to find that terminating Ms. Martin's parental rights was in the best interest of the children.

Affirmed.

GLOVER and VAUGHT, JJ., agree.